UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STEVEN WAMBOLDT,

Plaintiff,

v.

SAFETY-KLEEN SYSTEMS,

Defendant.

_____/

No. C 07-0884 PJH

ORDER GRANTING LEAVE TO AMEND COMPLAINT

Now before the court is the motion of plaintiff Steven Wamboldt ("Wamboldt") for leave to amend his complaint pursuant to Federal Rule of Civil Procedure 15(a). Having carefully reviewed the parties' papers and considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS Wamboldt's motion for the following reasons.

BACKGROUND

This action arises from defendant Safety-Kleen Systems, Inc.'s ("Safety-Kleen") alleged failure to pay overtime. Plaintiff originally filed his complaint on November 17, 2006 in Los Angeles Superior Court. Safety-Kleen removed the case to the Central District alleging that this action meets the requisites of the Class Action Fairness Act of 2005. Upon Wamboldt's motion, the case was then transferred here, where the related case *Perez v. Safety Kleen Systems, Inc*. (Case No. 3:05-cv-05338-PJH) was pending. *Perez* had been removed to this court on December 23, 2005.

Wamboldt, a former Safety-Kleen employee, alleges that Safety-Kleen failed to pay overtime due to its customer service representative employees. Wamboldt also claims that

Safety-Kleen improperly reduced commissions payable to those employees. Plaintiff now seeks to amend his complaint to add: 1) allegations and requested remedies under the Labor Code Private Attorney General Act for civil penalties, Cal. Labor Code Section 2699; and 2) a claim of failure to pay commissions due ("commission compensation claim"). See Proposed Am. Compl. ¶¶ 7, 12-15, 30-32.

DISCUSSION

A. Legal Standard

Federal Rule of Civil Procedure ("FRCP") 15(a) requires that a plaintiff obtain either consent or leave of court to amend its complaint once defendant has answered. "[L]eave shall be freely given when justice so requires." See, e.g., Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990) (leave to amend granted with "extreme liberality"); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048 (9th Cir. 2003) (same). Leave to amend is thus ordinarily permitted unless the amendment is futile, untimely, would cause undue prejudice to defendants, or is sought by plaintiffs in bad faith or with a dilatory motive. DCD Programs, Ltd. V. Leighton, 833 F.2d 183, 186 (9th Cir. 1987); Foman v. Davis, 371 U.S. 178, 182 (1962).

B. Wamboldt's Motion

Wamboldt first requests leave to amend his class action complaint to add allegations concerning civil penalties. Wamboldt maintains that these claims could not be alleged until he exhausted these claims through the Labor & Workforce Development Agency. That agency issued its statutory clearance on January 4, 2007, copying Safety-Kleen. Safety-Kleen opposes Wamboldt's amendment to add this claim only on the grounds that a motion pursuant to FRCP 15(d), not FRCP 15(a), is the proper procedural mechanism. Because the standards for granting or denying a motion to supplement a complaint pursuant to FRCP 15(d) are the same as those for granting or denying leave to amend, because Safety-Kleen concedes that supplementing the pleading would have been proper, and because amendment is required to add Wamboldt's commission compensation claim,

Wamboldt may amend his complaint to add this claim. See Glatt v. Chicago Park Dist., 87 F.3d 190, 194 (7th Cir. 1996).

Safety-Kleen also opposes the addition of Wamboldt's claim for commission compensation violations. Wamboldt alleges that Safety-Kleen impermissibly reduced the amount of employee commissions in violation of California Code of Regulations, 8 Cal. Code Regs. § 11010 et seq. Safety-Kleen does not claim it will be prejudiced by Wamboldt's proposed amendment, and the record is devoid of any evidence of prejudice.[1] To the contrary, this case is still young: dispositive motion and class certification deadlines were set on April 17, 2007, and discovery has only recently commenced. Safety-Kleen, however, opposes amendment on the grounds that: (1) Wamboldt engaged in forum shopping in bad faith and with undue delay; and (2) amendment would be futile. In the absence of prejudice, there must be a "strong showing" of bad faith, undue delay or futility to overcome FRCP 15(a)'s presumption in favor of granting leave to amend. See Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) ("Prejudice is the touchstone of the inquiry under rule 15(a)."). There is no such strong showing here.

1. Delay and Bad Faith

Safety-Kleen argues that Wamboldt deliberately omitted a commission compensation claim in his original complaint in an attempt to forum shop, exhibiting both delay and bad faith. Safety-Kleen maintains that a related lawsuit filed by David Stegall ("Stegall") included a claim for commission compensation violations, that Safety-Kleen stipulated that Wamboldt could join that suit, but Wamboldt and his counsel then tried to strip away claims from that lawsuit and add them to Wamboldt's complaint, hoping for a better judicial assignment, as Stegall's complaint was pending before a federal judge in the Central District "not to their liking."

---

[1] In fact, the record shows that Wamboldt notified Safety-Kleen that it intended to add the commission compensation claim at least as of December 4, 2006 in Wamboldt's opposition to removal, less than a month after he filed his complaint. Plaintiff's counsel waited to bring this motion pending transfer to this district. See Ramos Decl. ¶ 4.

Plaintiffs typically strategize when picking a forum in which to file a complaint. Wamboldt was entitled to choose a forum and file his complaint in state court. There are a variety of reasons why one plaintiff would drop certain claims from a complaint and why a different plaintiff would add those claims. Safety-Kleen's allegations of forum shopping are based on the facts that when Safety-Kleen's counsel withdrew his initial offer to transfer Wamboldt's and Stegall's cases to this district where the related *Perez* case was pending, Wamboldt's counsel mentioned that Safety-Kleen's counsel probably "like[d] the judge" in the Central District. This does not evidence impermissible forum shopping. In fact, it indicates that prior to filing his complaint, Wamboldt's counsel already contemplated moving to transfer both actions to the same forum – the Northern District. In sum, there is insufficient evidence of bad faith to overcome FRCP 15(a)'s presumption in favor of granting leave to amend. See Hurn v. Retirement Fund Trust of Plumbing, Heating & Piping Industry of So. Calif., 648 F.2d 1252, 1254 (9th Cir. 1981) (citation omitted) ("Where there is lack of prejudice to the opposing party and the amended complaint is obviously not frivolous or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion.").

2. Futility

Ordinarily, courts do not consider the validity of a proposed amended pleading in deciding whether to grant leave to amend. Denials based on futility are rare. See Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure Before Trial (2006) § 8:422. These challenges are usually deferred until after leave is granted and the amended pleading filed. See, e.g., Netbula, LLC v. Distinct Corp., 212 F.R.D. 534, 549 (N.D. Cal. 2003); Abels v. JBC Legal Group, P.C., 229 F.R.D. 152, 157 (N.D. Cal. 2005). Before discovery is complete, a proposed amendment is futile only if no set of facts can be proved under the amendment which would constitute a valid claim or defense. See Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988).

Safety-Kleen argues that Wamboldt should not be able to add a commission compensation claim because the claim will not survive summary judgment. Safety-Kleen

argues that it is permitted to take revenue into account when calculating commissions, because California Code of Regulations, 8 Cal. C. Regs. § 11070 only prohibits taking certain expenses into account when calculating bonuses. See Ralphs Grocery Co. v. Superior Court, 112 Cal. App. 4th 1090, 1094 (2003) (bonus plan taking certain prohibited expense items into account is unlawful; however, other expense items "may lawfully be considered in profit-based bonus programs"). Safety-Kleen claims that its commission plan does not take any expenses into account, is only based on revenue, and does not violate the law.

Wamboldt's proposed complaint, however, alleges that defendant reduced commissions based on lack of branch profitability. See First Am. Complaint ¶¶ 10, 16, 17, 22(e), 37). As Safety-Kleen acknowledges, profitability is a measure that takes into account both income and expenditures. Because the proposed amended complaint alleges that defendant takes into account expenses and profitability, a set of facts can be proved under the amendment which would constitute a valid claim or defense, and therefore the proposed amendment is not futile. See Miller, 845 F.2d at 214.

CONCLUSION

The motion to amend is GRANTED. Wamboldt shall submit an amended pleading in accordance with this order within 20 days, and Safety-Kleen shall file its response within 20 days thereafter.

IT IS SO ORDERED.

Dated: May 7, 2007

PHYLLIS J. HAMILTON
United States District Judge